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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 126

HARVEY K. JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. pp. 11-13) is reported at 330 F.2d 445.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1964. On May 8, 1964 Mr. Justice Black extended the time for filing a petition for a writ of certiorari to May 28, 1964 and the petition was filed

on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court correctly instructed the jury that, under the circumstances of this case, petitioner had no right to make a "citizen's arrest" of revenue officers who were attempting to collect a tax delinquency from him.

2 Whether the court abused its discretion in denying motions for a continuance.

STATEMENT

1. After a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted under a one-count indictment charging him with forcibly impeding internal revenue officers in the execution of their duties (18 U.S.C. 111). He was sentenced to 18 months' imprisonment, the first six months to be served in jail and the remainder to be suspended during a two-year period of probation. The court of appeals affirmed *per curiam*. The evidence may be summarized as follows:

On the day in question an internal revenue collection officer named Hughes and a trainee agent named Hash came to the office of the petitioner, a physician, to collect a delinquent tax account. The men identified themselves to petitioner. Hughes had a discussion in the waiting room area concerning the taxes in question (R. 27-30, 68-69). After Hughes said that he and Hash were leaving (R. 31), petitioner—some of

whose assets had been previously attached by the Internal Revenue Service in connection with another matter (R. 50-54)—asked the agent if he proposed to file another lien against his property and bank account. Hughes answered "that that was the law and that I intended to enforce it" (R. 31). At this point petitioner reached into a drawer, took out a revolver and told the Revenue officers he intended to protect his property from liens. Petitioner directed them to sit down, pointing with the gun toward seats in an office area (R. 31-33, 70-71). While still holding the gun, petitioner asked a Mr. Carthel, who was also present in the area, if he knew the identity of the United States Marshal (R. 35). Carthel, a local deputy sheriff and a friend of petitioner, who had come into the office prior to any of the tax discussion (R. 36, 170, 134), said he did not know the man (R. 35). Petitioner then placed a telephone call to the local sheriff (R. 36, 72). Following this, petitioner asked Hughes for the name of his supervisor and then proceeded to call the supervisor, one Stephens (R. 37, 73). After the telephone call, petitioner put the gun away (R. 38) but it remained within arm's reach (R. 39).

About five minutes later Stephens arrived, identified himself to petitioner, and asked what the trouble was. Petitioner replied that "the Internal Revenue was depriving him of his constitutional rights and that he had placed Mr. Hash and Mr. Hughes under a citizens arrest and was holding them for the U. S. Marshal to come and pick them up" (R. 93-94).

Stephens asked petitioner if either of the men had abused him or insulted him in any way and petitioner said they had not (R. 94). Stephens then advised petitioner that since he did not feel that he owed the tax in question, he could apply for a restraining order to prevent the filing of a lien. Petitioner replied that he was not interested in obtaining a restraining order, that he had his constitutional rights to protect and that "this was his manner in protecting them" (R. 94). Following this discussion Stephens told petitioner that his men were not under arrest, that the three were going to leave and that if the marshal wanted to effect an arrest they would be at their office (R. 94). As the men started to leave petitioner again took the revolver out of the drawer and pointed it directly at Stephens' stomach (R. 95-96). All sat down and petitioner then began to discuss his difficulties with the Internal Revenue Service. Stephens told petitioner that he refused to discuss the matter under the circumstances and obtained permission to telephone his office (R. 97). Stephens called agent Parramore. At this point petitioner again put the gun away (R. 97).

Shortly thereafter Parramore arrived at petitioner's office and identified himself. Stephens explained to Parramore that the situation had arisen because Hughes had said he was going to file a lien to collect taxes which petitioner felt he did not owe (R. 98, 110). Stephens again told petitioner of his right to apply for a restraining order or to pay the tax and file a claim for refund which would be settled through the courts (R. 98, 110). Petitioner replied "that he

had his constitutional rights to protect and this was his manner to protect them, but he did not want to have to kill anyone to do it" (R. 98). Parramore then obtained petitioner's consent to allow Hughes, Hash, and Stephens to leave. Parramore stayed behind for twenty or thirty minutes during which he discussed with petitioner the various tax questions involved. In the course of this discussion petitioner related that the agents had indicated they intended to file a lien and levy on the bank account, but he did not say that the men had abused or cursed him, or threatened him with any other course of action (R. 110-112). When Parramore asked petitioner if he realized the seriousness of pulling a gun on Revenue officers, he answered that "well, it may be one way to get all of it in the open" (R. 112).

Petitioner himself testified that he took out the gun when agent Hughes, as he was about to leave, said "I'm going to close you up and shut you up where you can't do anything" (R. 175).[1] Petitioner related that he then placed Hughes under a "civilian arrest", explaining that he had taken Hughes' statement as a definite threat against his business and right to make a living (R. 176). As for the use of a gun against Stephens, petitioner testified (R. 182):

> Mr. Stephens was leaning over as I was sitting * * * * talking to Mr. Stephens. I don't know whether it was intentional or not, but he was reaching for me, I assumed, as if he were going

[1] Petitioner's wife and a nurse employed by petitioner testified that they also heard this remark (R. 130, 228).

> to take hold of me, coming with his hands bent over, and as Mr. Stephens assumed that position, I reached back to the drawer to pull that drawer open and pull that gun out with my left hand. I told Mr. Stephens, 'It's time for you to sit down.'" [2]

Petitioner testified that he told Stephens that he too was under "civilian arrest" and allowed him to call agent Parramore (R. 183). He admitted that the gun was loaded at all times (R. 198). Petitioner conceded that when he discussed the matter with Parramore, after the release of the three men, he never mentioned anything about Hughes' alleged threat to close up his business or about Stephens' alleged threatening motions (R. 202).[3]

2. The court instructed the jury that petitioner would have been justified in bringing his pistol into play if he was put in fear of bodily harm and acted upon a reasonable impulse of self-defense (R. 275). As to petitioner's attempt to "arrest" the three men, the court instructed, over timely objection:

> In respect to the Defendant's claim that he only used the pistol to put the Government Agents under arrest, you are instructed that the Defendant

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[2] Petitioner's wife said that Stephens made a "slight lunge" at her husband (R. 233, 238), which she first interpreted as a reach for the telephone or a book (R. 232, 233). Stephens himself denied making any motion, lunge or threatening gesture (R. 242).

[3] Various witnesses present in the waiting room called on by the defense testified that they heard no loud noise except that petitioner's voice rose a bit (R. 131, 134, 146, 148).

had no lawful right to make any such arrest under the circumstances shown in this record [R. 275].

ARGUMENT

1. The court correctly instructed that, under the circumstances of this case, the defendant had no right to make a citizen's arrest of the agents seeking to collect delinquent taxes. While petitioner seeks to justify the "arrest" in terms of "breach of the peace" (Pet. pp. 7-9), it is apparent that he was really concerned, not with any alleged breach of the peace, but with attempting to settle his tax dispute at gun point. In prosecutions under 18 U.S.C. 111 a defendant may not justify interference with federal officers on the ground that he had a good faith belief as to the correctness of his own position in the underlying dispute. *Finn* v. *United States*, 219 F. 2d 894 (C.A. 9), certiorari denied, 349 U.S. 906; *Armstrong* v. *United States*, 306 F. 2d 520 (C.A. 10); *United States* v. *Miller*, 233 F. 2d 173 (C.A. 2). Moreover, as the court of appeals pointed out, there was no evidence of any breach of peace, under Article 474 of the Texas Penal Code.[4]

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[4] An "offense against the public peace"—for which a citizen may arrest—consists of the use of loud, vociferous, obscene, vulgar, or indecent language; cursing, swearing, yelling or shrieking; exposure of the person; or use of a deadly weapon under certain circumstances. As shown in the Statement, *supra*, the revenue agents here did not engage in any of the conduct proscribed by Article 474 and there was thus no "offense against the public peace" for which any citizen's arrest could have been made.

2. The petitioner was indicted on May 13, 1963, and arrested on May 15, 1963 (R. 3, 5). On June 20, 1963 counsel filed a motion for a continuance wherein he said that he had been advised that trial was set for June 24, that he had just been retained on June 17 and that he needed time to prepare a defense, investigate, and interview witnesses (R. 5-7). In the motion counsel represented that petitioner had previously employed another attorney but that differences had arisen between them (R. 6). This motion was denied on June 24, 1963. On June 25, 1963—two days before trial actually began—counsel filed another motion for a continuance on the ground that two named defense witnesses were unavailable through illness (R. 8-10). Attached to the motion were affidavits from a doctor to the effect that both persons were physically unable to appear in court (R. 10-12). Counsel stated that the testimony of the two witnesses would be material and would comprise "an integral part of his defense" because, unlike some other witnesses, both were present throughout the incidents at bar and heard the conduct of all parties involved (R. 9). This motion was denied on June 26, 1963 (R. 12). Trial began the next day, June 27.

As the court of appeals ruled, there was no abuse of discretion in the denial of these motions. As to the first motion, the court could readily conclude that there was ample time for preparation of the case where counsel had been retained on June 17 and the case was not scheduled for trial until June 24. Particularly is this so where petitioner knew of the

charge since May 15 and had previously retained another lawyer who was presumably available for consultation. As to the second motion, grounded on the absent witnesses, petitioner made no particularized allegation as to the expected testimony of the witnesses. It is settled that there is no abuse of discretion in denying a motion for continuance based upon absent witnesses where the expected testimony of the witnesses is not outlined. *Reiss* v. *United States*, 324 F. 2d 680 (C.A. 1); *Sanchez* v. *United States*, 311 F. 2d 327 (C.A. 9), certiorari denied, 373 U.S. 949. Moreover, viewing the matter in the light of the entire record, it is apparent that the testimony of the two witnesses could have added virtually nothing. One of the proposed witnesses, petitioner's receptionist, was at lunch during part of the events at bar (R. 125-216) and her place in the office was taken by the nurse who did appear as a defense witness. The other absent witness was present in the waiting room of the petitioner's office and was said by the nurse to have been aware of the incidents at bar (R. 127, 139). However, it must be assumed—at least absent any specific showing to the contrary—that his testimony would have been merely cummulative, since the defense did produce four witnesses who were present in the office area, including one who was in the waiting room.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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